No. 83-411

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GULF OIL CORPORATION,
Petitioner
v.
FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY OF GULF OIL CORPORATION TO BRIEFS IN OPPOSITION

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Gulf Oil Corporation (Gulf)[1] hereby replies to the briefs in opposition to the petition for writ of certiorari filed by the Federal Energy Regulatory Commission ("Commission" or "FERC"), Public Service Commission of the State of New York ("PSCNY"), and Philadelphia Gas Works ("PGW").

Respondents mistakenly assert that issues raised by Gulf are fact specific to Gulf's contract and not inconsistent with prior decisions of this Court or other circuits (FERC Br. 8; PSCNY Br. 7). The issues are important in the Commission's administration of related statutes, as PGW concedes (Br. 6); involve fundamental questions of procedural due process as to remedial orders and modification of prior, final orders, and embrace con-

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[1] The Statement under Rule 28.1 as to corporate affiliations appears in the Petition filed on September 12, 1983.

tractual *force majeure* and other suspensive conditions in question in numerous other civil and administrative actions.

I. SUBSTANTIVE MODIFICATION OF FINAL, PRIOR ORDERS

Gulf has shown that the Commission's new orders substantively change final orders issued in 1976 by (i) denying Gulf the right to reduce its "refunds" upon showing that "damages" to customers of Texas Eastern Transmission Corporation actually were less than hypothetical amounts merely assumed in the Commission's formula in 1976, and (ii) retroactively increasing rates of interest and barring Gulf's recoupment of interest after December 16, 1976 (Pet. 9-11). Gulf also has shown that the results of the new orders compel payment of "reparations" or "damages" which this Court has held the Natural Gas Act does not authorize (Pet. 11-12).

Respondents argue that the new orders simply "flesh out" remedies generally upheld in the prior orders. They ignore the significant legal point, however, that those 1976 final orders established substantive and procedural standards and holdings which the Commission unlawfully changed in the "fleshing out" process.

A. As to the amounts of Gulf's "refunds," the new orders direct payments under a previously constructed hypothetical formula and dismiss unchallenged evidence that, in fact, the customers will suffer *no* ultimate damages but will realize net benefits up to $802 million. Respondents incorrectly claim that prior holdings on the lawfulness of the hypothetical formula now preclude a showing of reduced or non-existent customer damages. PGW Br. 3; FERC Br. 3, 8. However, the 1976 orders on which Gulf's payments were premised provided in uncontrovertible terms that the determination of the principal of the payments was left open:

> "All of these matters will be addressed in the proceeding for distribution of refunds. Should the Com-

> mission reach the conclusion in those proceedings that the ultimate amount of damages to all customers was less than the refund paid by Gulf to Texas Eastern, the excess of the funds would, of course, be remitted to Gulf." *Gulf Oil Corp.*, 56 F.P.C. 3492, 3499 (1976).

In the later "comment" proceedings, the Commission rejected the *only* evidence on "ultimate damages" and held such evidence to be foreclosed, irrelevant, and incongruous (App. 70a-73a).

Respondents do not address this central issue presented in this case. The Commission notes (Br. 8-9) that in 1976, it rejected a computation purporting to show "actual damages." Only in its covert, incomplete footnote (Br. 9 n.4) does the Commission acknowledge that in 1981, it reneged and never held the contemplated *later* proceeding to determine the *actual* amount of Gulf's payment—a determination essential to discharge the Commission's undertaking, its statutory duties, and its obligation to accord due process of law.

B. Similarly in 1976, the Commission expressly and unambiguously ordered that Gulf pay simple interest on payments at the fixed rate of 9 percent after October 10, 1974. *Gulf Oil Corp.*, 56 F.P.C. 2293, 2307 (1976). However, the new orders in 1981 required, retroactively, interest paid at the prime rate, compounded quarterly. App. 85a. The Commission further held (App. 81a-83a) that Gulf could not "recoup" interest after December 16, 1976, despite the court's holding in 1977 that Gulf was entitled to recoup interest as well as principal. *Gulf Oil Corp.* v. *FPC*, 563 F.2d 588, 607, 609 (3d Cir. 1977), cert. denied, 434 U.S. 1062 (1978). The legal significance of these facts is that the Commission has now unlawfully disturbed substantive provisions of final orders which neither provided for modifying the express fixed interest rate nor held Gulf accountable for nonrecoupable payment of accrued interest after December 16, 1976.

Arguments (FERC Br. 10; PGW Br. 12) that Gulf loses only the "time value" of its "refunds" miss the mark and are deliberately obfuscatory. "Interest" and "time value" represent wholly different financial concepts. Unquestionably, Gulf does lose the "time value" of its money, *i.e.*, the use of the funds between the 1982 dates of payment by Gulf and the future dates of recoupment. However, all interest, together with the principal, which accrued on the "refund" corpus *before Gulf paid out* the money was to be "recouped" by Gulf at a later date. The Commission did *not* disagree with this analysis when raised by Gulf in 1976, and the court of appeals affirmed on this basis. *Gulf Oil Corp.* v. *FPC*, *supra*.

Likewise, arguments that denying Gulf's recoupment of post-December 16, 1976 interest rectifies prior "delays" in making payments (PGW Br. 13; FERC Br. 8, 10) are wrong. The legally significant facts are that (i) the 1976 orders did *not* require *any* payments by a certain date but left that date open to *Commission* determination[2]; (ii) earlier judicial proceedings concluded in February 1978; and (iii) the Commission, *not* Gulf, delayed entering an order as to refunds for 48 months thereafter.[3]

The gist of respondent's arguments is that the Commission, in its new orders, acted equitably and consistent with hindsight. These new orders, however, unlawfully

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[2] *Gulf Oil Corp.*, 56 F.P.C. 2293, 2307 (1976) (". . . On December 15, 1976, Gulf shall *file* a computation of refunds. . . . Gulf shall *make* the required refund to Texas Eastern within 30 days of Commission approval of Gulf's computation. . . .") (Emphasis added).

[3] PGW's position (Br. 13), in particular, is off-target. Gulf's "unsuccessful appeal" of prior orders is no basis for now denying recoupment. Gulf did not "retain control" over the "refund corpus until 1982," but held it only until the Commission ordered it paid. Gulf also did *not* establish an "escrow" in lieu of direct payment. That method was proposed by Texas Eastern and its major customers and approved by the Commission *after* receiving comments from all parties.

changed the substance of prior, final orders, contrary to Section 19(b) of the Natural Gas Act and decisions of this Court. *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 336, 339-341 (1958). See also Pet. 10-12. On issues of refunds, "damages," and interest, the Commission orders violate the Natural Gas Act and due process requirements, fully warranting this Court's review.

II. ORDERING CHANGES IN RATES OF INTEREST WITHOUT NOTICE

Gulf has shown that, contrary to the 1976 orders fixing interest at 9 percent after October 10, 1974 (Pet. 12-14), the Commission's new orders required higher compound interest, retroactively, at rates determined in an unrelated rulemaking docket. This other docket involved only rates of interest on collections in excess of "just and reasonable" rates under Section 4 of the Natural Gas Act and rates under Title I of the Natural Gas Policy Act (Pet. 12-13). Gulf had no notice in the 1976 orders or the unrelated rulemaking docket that interest rate on its "refund" payments was subject to modification (Pet. 13-14).

Respondents argue that the new orders are consistent with the current "money market" and correct "inequities." FERC Br. 10; PGW Br. 14-15. They do not, however, address the central issue that until the new orders were issued in 1981 and 1982, Gulf had no notice that the 9 percent interest rate on its payments was subject to modification.

The applicable interest rate, unlike the determination of the actual corpus of Gulf's payments, was *not* left open in the 1976 orders, but was fixed and unambiguous. Whatever the premise of the rate may have been—be it the then-used interest rates on excess collections under rate filings for proposed rate increases (PGW Br. 14) or some "money market" index (FERC Br. 10)—the Commission did not, contrary to respondents' implications,

provide that flexible interest rates would apply to Gulf's payments. *Gulf Oil Corp.*, 56 F.P.C. 2293, 2307 (1976). The rate was firm, and there was never any notice in 1976 that the fixed rate expressly ordered could or would be changed.

The unrelated rulemaking docket *by its own terms* applied to excess collections by producers and pipelines—not to the adjudicatory-type "refunds" paid by Gulf. Contrary to respondents (PGW Br. 14; FERC Br. 10.[4]), there was no hint in that docket that the new, general rates of interest would be applied to Gulf's payments.

PGW also argues (Br. 15) that revising the interest rate (presumably with or without notice to Gulf) corrects "inequities" attributable to Gulf's "delays" in implementing the prior orders because of its appeal of the 1976 orders. PGW is wrong. First, Gulf cannot be penalized for exercising its Constitutional rights to due process. Second, as noted *supra*, the legally significant facts

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[4] Commission reliance (Br. 10 n. 6) on *Shell Oil Co.* v. *FERC*, 664 F.2d 79 (5th Cir. 1981), is misplaced. Gulf's "refunds" are not attributable to collections in excess of lawful amounts, but are based upon underdeliveries during specific periods. Furthermore, the Commission has, in other proceedings, ordered use of particular interest rates and left those rates unmodified. *E.g.*, *Area Rate Proceedings (Southern Louisiana Area)*, 46 F.P.C. 86, 146 (Opinion No. 598) (1971); *Cities Service Gas Co.*, Docket No. RP74-4 5 F.E.R.C. ¶ 61,092 (Opinion No. 24-A) (1978).

Similarly, recent orders involving interest on over collections by oil pipeline owners of the Trans Alaskan Pipeline System demonstrate the inconsistencies in directing retroactive payment of higher interest. Alaska had argued for retroactive application of the prime interest rate to refunds on overcharges, no matter when collected—a position akin to the new orders issued as to Gulf's interest rate. The Commission rejected Alaska's argument, however, based on the TAPS owners' reliance on lower rates otherwise effective before the new rule was issued. *Rate of Interest on Amounts Held Subject to Refund: Oil Pipelines*, Docket No. RM77-22-000 (Order No. 273-A) (November 21, 1983). Like the TAPS owners, Gulf relied upon the fixed interest rate specified in prior orders as to its "payments."

are that the Commission, not Gulf, delayed acting as to "refunds." In fact, *all* amounts of interest are a result of the Commission's delay in ordering "refunds" after February 1978. Compare *Estate of French* v. *FERC*, 603 F.2d 1158 (5th Cir. 1979).

The respondents have not refuted the facts that the 1976 orders and the unrelated rulemaking docket gave *no* notice to Gulf that the fixed rates of interest on its payments were subject to change retroactively. Final orders have been disturbed, contrary to statutory and constitutional requirements. The question of the Commission's authority to change interest rates without notice is important to the administration of the Natural Gas Act and warrants review by this Court.

III. THE DECISIONS BELOW ON *FORCE MAJEURE* ISSUES

Gulf has demonstrated the importance of the *force majeure* questions in administering the Natural Gas Act, interpreting natural gas contracts between private parties, and avoiding uncertainty in applying principles of law as to *force majeure* issues pending in numerous actions (Pet. 20-22). Gulf has also shown that the court of appeals' decision (i) disregarded the controlling effect of an unconditioned certificate under Section 7 of the Natural Gas Act, contrary to holdings of this Court (Pet. 15-17); (ii) failed to apply the correct source of law and principles of construction in reviewing the interpretation of Gulf's contract, contrary to decisions of this Court and other courts of appeals (Pet. 18-20); and (iii) improperly usurped the functions of an administrative agency and exceeded the scope of reviewing authority (Pet. 17, 23-24).[5]

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[5] On this issue, the Commission concedes (Br. 11) that the court made findings on whether Gulf's evidence met the due diligence test. But see PSCNY Br. 10 and PGW Br. 11. If the court concluded that

PGW concedes the importance of these questions (PGW Br. 6), and the Commission agrees that the court of appeals misconstrued the Commission decision and misplaced reliance on certain "common law" *force majeure* cases (FERC Br. 11). In other respects, however, the respondents attempt to side-step the compelling reasons that this Court should review the decision below.

A. No respondent addresses the court of appeals' gross misapplication and misinterpretation of *Sun Oil Co.* v. *FPC*, 364 U.S. 170 (1960), and *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137 (1960). The opinion below, erroneously resting on misinterpretation of decisions in these cases, held that Gulf's contract and unconditioned certificate issued in 1963 under Section 7 of the Natural Gas Act could *now* be disregarded and *new* conditions imposed. See Pet. 15-16. This erroneous holding is a fundamental legal error from which other errors of interpretation and construction followed.

B. The Commission—even though it agrees the court's legal determination is erroneous—incorrectly states (Br. 11) that the decision below is narrow because it is limited to the *force majeure* clause in Gulf's contract. The *force majeure* clause in Gulf's contract is not unique, and the decision is not so restricted.[6] The text of Gulf's *force majeure* clause, with the exception of one phrase dealing with the depletion of reserves, is entirely consistent *in all*

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the order was not supported by substantial evidence, as PGW states (Br. 4), then the proper action was a remand—not the entry of specific findings and detailed orders as to proof and conclusions which the Commission must reach. See Pet. 23-24.

[6] The Commission (Br. 11 n. 7) also has not explained away any importance of the issues here as they relate to pending "take or pay" cases and other cases referred to by Gulf (Pet. 21 n. 13). The relevant issue is what source of law aplies to interpreting those contracts and the rights and obligations of sellers and buyers. The "reasons behind nonperformance," whether similar or not, do not remove the necessity of addressing and deciding the same legal issue.

material respects with other *force majeure* clauses in contracts, "warranty" and "non-warranty" alike (see PGW Br. 10), entered into during the 1960s by Texas Eastern (Gulf's purchaser) with other producers, by Gulf with other buyers, and by other sellers with pipeline purchasers.[7]

C. PGW (Br. 6) and PSCNY (Br. 7, 9) base their arguments on a claim that the "warranty" nature of Gulf's contract is a distinguishing factor. They are wrong. The issue is not whether the contract contains a warranty, but whether the court below interpreted the contract, including all obligations and terms, consistent with the correct source of law and principles of contract construction.

By elevating one term of Gulf's contract—a warranty to deliver a specified volume of natural gas—over all other terms, the respondents, like the court below, ignore interrelated and companion clauses which *expressly* make the warranty "subject to" other contract provisions, including *force majeure*. Arguments that the "warranty" takes precedence over contract terms of equal dignity would read the *force majeure* clause out of the contract. As the court below has done, the respondents improperly ignore specific contract provisions, including "subject to" limitations and particular *force majeure* events, in favor of more general language. Principles of contract construction require the opposite.

D. As to the applicable source of law, PGW claims that the court below need not follow state law if not inconsistent with "general" law (Br. 7-8). Contrary to PGW, *Pennzoil Co.* v. *FERC*, 645 F.2d 360, 383-387 (5th Cir. 1981), cert. denied, 454 U.S. 1142 (1982), is consistent

[7] For instance, the clause in Gulf's contract (App. 11a) is consistent with and comparable to the *force majeure* clause set forth in 4 Williams & Meyers, *Oil and Gas Law*, Sec. 733, pp. 793-794, that is taken from a contract at issue in *Union Carbon Co.* v. *Monroe*, 92 F.Supp. 460 (W.D.La. 1950), aff'd, 196 F.2d 455 (5th Cir. 1952).

with 30 years of decisions holding that state law governs disputes under natural gas contracts. See Pet. 18, 20. The Commission correctly applied state law principles of construction from which the court departed.[8]

Further, contrary to PSCNY (Br. 8) and PGW (Br. 7), the Commission looked properly to Gulf's contract as a whole, and did not base its interpretation of *force majeure* on its refund-recoupment remedy. The Commission correctly held:

> "The *force majeure* provision, including its broad definition of the term, was a bargained-for part of the gas sales contract. As such, it is an integral part of the contract defining the rights and responsibilities of the parties." App. 42a.

The Commission's intepretation is also consistent in its entirety with prior holdings in the 1976 proceedings. *Gulf Oil Corp.*, 56 F.P.C. 2293, 2304, 2307 (1976), and with related opinions not requiring the maintenance of excess reserves before invoking *force majeure*. *Gulf Oil Corp* v. *FERC*, 575 F.2d 67, 70 n.4 (3d Cir. 1977), aff'g, 58 F.P.C. 1703, 1717, reh. denied, 59 F.P.C. 449 (1977).[9]

Whatever state law applies (compare PGW Br. 8), the holdings below are improperly based on federal government contracts cases which by their language, construe particular *force majeure* provisions. PSCNY also is wrong (Br. 11) in asserting that the "issue" in *United States* v. *Brooks-Callaway Co.*, 318 U.S. 120 (1943), involved "floods" and is "virtually identical to Gulf's position." The issue there was whether a particular event

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[8] Assertions by PGW (Br. 8) and PSCNY (Br. 12) that Gulf did not properly "preserve" the question of the applicable source of law are unfounded. The court's opinion first gave rise to this question which was raised by Gulf in its petition for rehearing below.

[9] PGW and PSCNY appear to read the Commission's opinion, App. 31a, from opposite ends. PSCNY (Br. 8) believes the opinion is a "policy interpretation," while PGW (Br. 10) believes "the Commission was not engaged in a policymaking decision."

was "unforeseeable," a specific requirement of the *force majeure* clause in that contract. "Unforeseeability" is not at a requirement in Gulf's *force majeure* provision, and cases involving interpretation of clauses with that requirement are inapplicable.[10]

On all questions involving *force majeure*, the court below erred. Its decision warrants review.

CONCLUSION

For these reasons and those set forth in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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[10] PSCNY (Br. 12 n. 6) misconstrues Gulf's position as to *Brooks-Callaway* and *Eastern Air Lines Inc.* v. *McDonnell Douglass Corp.*, 532 F.2d 957, 992 (5th Cir. 1976). See Pet. 19. The rule stated in *Eastern Air Lines* is that an express provision in an agreement can protect a promisor against foreseeable events. In *Brooks-Callaway*, only unforeseeable events were included. Gulf's *force majeure* clause contains no such limitation.